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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETE LE'MON,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioner Pete Le'Mon hereby replies to the brief in opposition of respondent National Labor Relations Board ("NLRB").

ARGUMENT

1. The NLRB's "question presented" is disingenuous. Le'Mon's second question asks whether

> a violation of the duty of fair representation [is] established where the labor organization that is the employees' exclusive representative under § 9(a) failed to advise them that it had *not* fulfilled its mandatory duty

> to file the notice of strike required by § 8(d) both prior to the employees' vote on whether to ratify their employer's bargaining proposal or engage in a strike, and again after the strike began when that default was questioned—and, as a result, those employees were terminated from employment?[1]

The NLRB restates this question as

> [w]hether the [NLRB] reasonably concluded that a union had not acted arbitrarily, in violation of its duty of fair representation, by failing to give timely notice of a labor dispute before calling a strike and by encouraging employees to continue the strike after they had been discharged because of the untimely strike notice.[2]

Artfully, the NLRB excises the crucial elements that: (i) a key union agent, its attorney, concededly *knew the required § 8(d) notice had not been filed before the union called its* pre-*strike meeting of employees to reject the collective-bargaining agreement Aztech offered*; (ii) at that meeting and thereafter, the union *failed to inform the employees that it had not given the § 8(d) notice*; and (iii) as the predictable result of the union's failure so to inform them, while otherwise promoting the strike, the employees *lost their jobs*.

2.a. In the body of its brief, the NLRB first claims that Le'Mon's attack upon "the Board's finding that the Union's conduct amounted to mere negligence" is a "fact–bound claim [that] does not warrant review", and that (in any event) "the Union agents [Briggs and Gilliland] did not know that the notice to the FMCS had not been timely filed when the decision to

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[1] Petition in No. 91-2049, at i.

[2] NLRB Brief at I.

strike was made".[3] This begs the *legal* question of whether the union (and, through it, Briggs and Gilliland) was on notice of the untimeliness of the filing because *another* of its agents—its attorney—admittedly knew of that fact at all material times.

b. The NLRB then argues that Briggs' and Gilliland's "'conduct was not so lacking of a rational or logical basis as to be arbitrary'", because, "[u]nable to reach their attorney, [they] acted within the limits of 'their competence and experience' *** in telling the employees that [Aztech's] letter [referring to the illegality of the strike] was company 'rhetoric' or a company 'ploy'".[4] The NLRB does not explain, though, how it was within "their competence and experience" for Briggs and Gilliland to denounce Aztech's—and, indeed, the NLRB Regional Officer's—public position on the illegality of the strike as merely "rhetoric" and a "ploy". To the contrary: The NLRB concedes that they "'were not lawyers and did not seem to understand the effect that the failure to give proper 8(d) notice had on the strikers' status as employees'".[5] These circumstances compel characterization of their conduct as so devoid of a rational or logical basis as to be, not simply arbitrary, but patently *reckless*.[6]

The NLRB contends that, even had Briggs and Gilliland known the effect of their recklessness when confronted with Aztech's letter, "the employees' only other option at that point would [have been] to apply for jobs as new hires".[7] Not

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[3] *Id.* at 7-8.

[4] *Id.* at 8.

[5] *Id.*

[6] As the old adage has it, "The man who acts as his own lawyer has a fool for a client."

[7] NLRB Brief at 8-9.

necessarily. There is no evidence that, had the union immediately conceded the illegality of and terminated the strike, Aztech would not have mitigated its policy of treating the employees as discharged by operation of law. Moreover, through its attorney, the union was on notice of the failure to file the § 8(d) notice *before* the crucial, *pre*–strike meeting at which the contract was rejected—about which key event the NLRB maintains a suspicious silence. Had the union proceeded with even a modicum of concern for the employees' jobs at *that earlier* point, the latters' later discharges would never have occurred.

3.a. The NLRB then argues that there is no conflict among the circuits, because the Ninth Circuit has not held as a general rule that a union's negligent failure to perform a ministerial duty always violates the duty of fair representation under all conceivable circumstances.[8] This begs the specific question of whether here the union's failure to perform a ministerial duty *mandated by § 8(d)* is arbitrary *per se*, given the strong congressional policy behind, and the severe consequences to employees of the union's failure to provide a timely notice under, that section.

b. Similarly question–begging is the NLRB's contention that

> the consequences of the union's negligence on the employees—*i.e.*, the loss of a job—is no greater than would be the case were the union to make negligent missteps in numerous other contexts, such as grievance proceedings.[9]

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[8] *Id.* at 9-10.

[9] *Id.* at 10-11.

As the NLRB concedes, those "other contexts" "require an exercise of judgment [by the union], whereas no exercise of judgment is called for in respect to an 8(d) notice".[10]

Neither can the NLRB rely on *O'Neill*.[11] Le'Mon does not seek recognition of a *new* category of improper union behavior under the duty of fair representation, to supplement the tripartite standard of "arbitrary, discriminatory, or bad faith" conduct. Rather, he simply urges that a union's unexcused failure to fulfill the mandatory statutory duty of § 8(d) is *per se* "arbitrary" conduct under the traditional rule. To this position, the NLRB seems to oppose only the argument that union conduct *cannot* be "arbitrary" if it is only "negligent". Revealingly, the NLRB does not venture to explain how this conclusion follows where the union's act is mandated by statute, wholly nondiscretionary, and unquestionably crucial to preservation of the employees' vital interests in their jobs.

c. The NLRB also contends that the union's failure to disclose to the employees the untimeliness of the § 8(d) notice is counterfactual, because

> [t]he Board found that [Briggs and Gilliland] were unaware that the Section 8(d) notice had not been timely filed when the strike decision was made and also were unaware of the legal significance of that failure.[12]

This further begs the question. *First*, the NLRB's finding that *Briggs and Gilliland themselves* "were unaware" at any point in time says nothing about whether *the union* should have been

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[10] *Id.*

[11] *Id.*, *citing* Air Line Pilots Ass'n v. O'Neill, __ U.S. __, 111 S. Ct. 1127 (1991).

[12] NLRB Brief at 11-12 n.7.

deemed "[a]ware" at all times through the conceded knowledge of its attorney—thus rendering Briggs and Gilliland, too, vicariously knowledgeable of the facts. *Second*, that Briggs and Gilliland "were unaware" (if so) does not absolve them, or the union, of responsibility where, finally made cognizant by Aztech's letter of vast lacunae in both their factual *and legal* knowledge, nevertheless they plunged ahead with reckless disregard for both the facts and especially the legal consequences of those facts to the employees' rights.

4.a. The NLRB then denies that Le'Mon's constitutional argument is "properly presented here" because Le'Mon "did not raise it before the Board" and "did not timely raise the issue in the court of appeals".[13] To raise the issue before the NLRB, however, would have been feckless, as administrative agencies lack power to declare unconstitutional the statutes that confer authority upon them. And the issue did not become apparent in the court of appeals until the latter issued its decision, at which juncture Le'Mon realized that that court did not intend to take seriously this Court's remand in *Le'Mon I*. Thus, Le'Mon raised the issue at the first fair opportunity to do so. Under these circumstances, nothing precludes this Court from addressing it.[14]

b. On the merits, the NLRB once again begs the question. To argue that Congress may constitutionally extinguish the individual employee's power to order his own relations with his employer and transfer that power to an exclusive representative *when the representative is precluded from acting "arbitrarily,*

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[13] *Id.* at 12-13 (note omitted).

[14] Because this petition arose from the decision of a federal court, this Court's normal policy of not considering issues not decided by a court of appeals is *prudential* only, and should not be followed inasmuch as: (i) Le'Mon's constitutional question is squarely presented now and will be fully briefed hereafter; and (ii) the parameters of the duty of fair representation are "an important, recurring issue". Carlson v. Green, 446 U.S. 14, 17 n.2 (1980).

discriminatorily, or in bad faith"[15] does not answer Le'Mon's charge that, under the circumstances of this case, exclusive representation is unconstitutional precisely because the NLRB and the court of appeals have licensed the union to act in violation of statute to Le'Mon's profound detriment. The NLRB circuitously contends that no constitutional violation occurred because the union's failure to file the § 8(d) notice was not "arbitrary"—as if constitutional results could turn on the affixation of labels. The issue, however, is whether exclusive representation is constitutionally sufferable, whatever label may attach to the union's conduct, where that conduct: (i) violated a clear, mandatory statutory duty; (ii) resulted in the wholly predictable loss of Le'Mon's employment by operation of law; and (iii) under the view of the NLRB and the court of appeals, gives rise to *no* remedy against either the union, its attorney, or anyone else.

CONCLUSION

Unions' implementation of their duty of fair representation affects millions of American employees on a day–to–day basis. Unfortunately, the standard by which that duty is enforced is ambiguous. This case presents the Court with a rare opportunity to refine that standard under particularly exigent circumstances. For that reason, Le'Mon's petition should be granted.

Respectfully submitted,

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[15] *See* NLRB Brief at 13-14.

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